IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD INDIAN RESERVATION, *et al.*,
Petitioners,

v.

JAMES M. NAMEN, *et al.*, AND THE CITY OF POLSON, MONTANA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT-INTERVENOR IN OPPOSITION

F. L. INGRAHAM
Counsel for Respondent-Intervenor
P. O. Box Drawer "Z"
Ronan, Montana 59864

CHRISTIAN, McCURDY,
INGRAHAM & WOLD
Professional Center Building
Polson, Montana 59860

INDEX

TABLES OF AUTHORITIES

CITATIONS

ACTS

TREATIES

MISCELLANEOUS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-185

CONFEDERATED SALISH AND KOOTENAI TRIBES
OF THE FLATHEAD INDIAN RESERVATION, *et al.*,
Petitioners,

v.

JAMES M. NAMEN, *et al.*, AND THE
CITY OF POLSON, MONTANA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT-INTERVENOR IN OPPOSITION

Respondent-Intervenor adopts, for the purpose of this Brief in Opposition, the material in the Petition under the headings of "OPINIONS BELOW" and "TREATIES AND STATUTES INVOLVED".

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition and the Respondent-Intervenor adopts the jurisdictional statement as contained in the Brief as its own.

QUESTION PRESENTED

Whether property owners of Federally Patented fee simple land adjoining the high water mark of the South half of Flathead Lake were intended by Congress to have as an indicent of such ownership a Federal common law right of access and wharfage.

STATEMENT OF THE CASE

In 1904, the United States Congress, [1] unilaterally, and without the consent of the Tribe, enacted legislation providing for the survey and allotment of lands under provisions of the General Allotment Act [2] of the United States and the sale and disposal of all of the remaining lands then embraced within the Flathead Indian Reservation.

In 1908, pursuant to the Act of April 23, 1904, supra, the United States allotted to Antoine Morais (Flathead Allottee No. 1378) a tract of land riparian to the South half of Flathead Lake. [3]

The South half of Flathead Lake, which is a navigable body of water, was included within the boundary of the original Flathead Indian Reservation. [4]

---

[1] Act of April 23, 1904, 33 Stat. 302.

[2] Act of 1887, 24 Stat. 388 as amended by Act of Feb. 28, 1891, 26 Stat. 794.

[3] Under the provision of the General Allotment Act, supra, the allottee was entitled to one-eighth section of land (80 acres). The record does not reflect why the allotment was diminished to 75.42 acres.

[4] Treaty of July 16, 1855, 12 Stat. 975

The Respondents are the owners in common through mesne conveyances of riparian portions of the Morais allotment. They operate a marina business upon these premises. As the proprietors of this business they have maintained and created certain buildings, docks, wharves and piers which extend beyond the high water mark and encroach on the beds and banks of Flathead Lake.

Flathead Lake was used extensively for commerical navigation from the years before 1900 into the 1920's. Large passenger and freight boats utilized its waters and the ports situate on the South half of the Lake.

By Act of June 21, 1906, 34 Stat. 325, 354, Congress amended the Act of 1904, supra so as to provide for the establishment of designated townsites at then existing settlements. Among these townsites was the City of Polson, Montana, located on Polson harbor on the South half of Flathead Lake. [5] Since its incorporation it has continuously maintained docks, wharves, piers and buildings below the high water mark and which encroach on the bed and banks of Flathead Lake. Under appropriate Montana Statutes it has, by annexation, included the lands of the Respondent Namens within its Corporate boundaries. It has, since before its incorporation, been recognized and established as a port and headquarters for navigation of the South half of the Lake. Additionally, it is the title owner through successive conveyances to the allotment of one Oscar Auld (Allottee No. 20624) which lands are riparian to the Lake. The Respondent City has developed a large recreational park upon the latter land for the benefit of the public. Included in the park facility is a large public dock used

---

[5] The City of Polson was on November 11, 1909, duly chartered and incorporated under Montana laws as a Municipal Corporation of the State of Montana. In 1923, it was designated as the County Seat of Lake County, Montana, by the Montana State Legislature. Sec. 16-224 R.C.M., 1947.

for swimming and boating. This dock, as the Namens', extends below the high water mark and encroaches on the bed and banks of Flathead Lake.

On August 6, 1973, the Petitioners filed an action in the United States District Court for the District of Montana seeking a judgment declaring that "the defendants' are in trespass upon plaintiffs' land to the extent that they maintain and have erected buildings and structures beyond the high water mark... of Flathead Lake and encroach on the bed and banks of said Lake." They ask the court to enjoin all further trespass and that "defendants be directed to immediately remove all buildings and structures, including landfills that extend beyond" the high water mark and that the lands below the high water mark "be restored to their original condition."

REASONS IN OPPOSITION

I.

The Petition of the Tribes should be considered only in light of the opinion on the "narrow" issue before the District Court. That determination was that the Federal common law concepts of riparian rights of access and wharfage apply to Federal grants of riparian lands on Indian Reservations despite the lack of any express Congressional language to that effect.

Since the inception of this action, the Petitioners have taken an inconsistent position. On the one hand they claim the benefit of the common law rule that the riparian owners to lands bordering navigable waters own only to the high water mark. Conversely, they reject the coextensive common law rule permitting riparian rights of access and dockage. Yet the former rule can only be

justified and explained upon the grounds that the latter is applicable. [6]

Significantly, at no point in the proceedings in the court of first impression did the Respondents indicate that the intent of the lawsuit was to establish ownership and by lease and regulations to ensure that the Tribes are compensated fairly for the use of their property. [7]

The District Court record was not sufficiently developed and does not include evidence and materials to enable this Court to consider issues which were first raised on appeal. [8]

Counsel for Petitioners are highly skilled and acknowledged as specialists in the Indian claims field. The Petition is replete with such phrases as "The integrity of this rule is now challenged"; "the court below violated this eminently sound and vital canon"; "Balancing of 'equities' between Indians and non-Indians cannot be permitted to stand"; and "erroneous assumptions".

Yet this Petition does not present to this Court one new argument. Nor does it offer any alternative constructions of the Treaty, statutes, cases, and surrounding circumstances which the court below in its well reasoned opinion was called upon to construe.

---

[6] "The general rule, of course, is that patents of the United States to lands bordering navigable waters, in absence of special circumstances, convey only to high water mark. The rule has its roots in the principle of the common law that ownership of the shore, comprising the area between high and low water should be in the sovereign in trust for the general weal." *Montana Power v. Rochester*, 127 F.2d, 189, 192 (9th Cir. 1942).

[7] Tribes Petition, p4, Footnote 8.

[8] For example, under the existing *Tribal Constitution, adopted and approved on Oct. 28, 1935*, by then Secretary of Interior Harold L. Ickes, the Tribal Council is restricted in leasing Tribal lands to a nonmember unless it shall appear that no Indian cooperative or individual member is able and willing to use the land and pay a reasonable fee for such use.

Quite simply, the position of the Petitioners is that, despite the exhaustive and voluminous briefs submitted by all parties, and despite the incisive analysis and inquiry into each of the relevant elements, the courts below inaccurately ascertained the intent of Congress.

It is to this position that Intervenor would address the remainder of its arguments.

II.

This Court in *DeCoteau v. District County Court,* 95 S.Ct. 1082 (1975), pronounced the standards which are applicable to the case at bar:

> "We are aware of course, that much modern thinking respecting the culture and welfare of the Indians is at marked variance with that of the period we now survey, that around the turn of the century. But we do not sit to rewrite the legislation of decades past. We do look to the Congressional intent when it was written viewing the totality of the circumstances from the record of its entirety..."

The cited decision is subsequent to the lower court's opinion which adopted the following criteria as its guidelines citing *Stevens v. C.I.R.,* 452 F.2d, 741, 744 (9th Cir. 1971):

> "Federal policy toward particular Indian Tribes is often manifested through a combination of general laws, specific acts, treaties, and executive orders. All must be considered in pari materia in ascertaining congressional intent. *Kirkwood v. Arenas,* 9th Cir. 1957, 243 F.2d, 863, 867."

In arriving at its opinion the court applied the more stringent standard in an incisive analysis of the two relevant Treaties; the effect of the Allotment Acts and other Congressional Enactments; the applicability of Federal common law rules; applicability of Tribal law;

Federal recognition of Tribal jurisdiction; the effect of status of Indian trust land; and the failure of Congress to expressly grant riparian rights.

In each of the above areas of discussion the court below referenced supportive documents and case authority as it methodically sustained or rejected the contentions and theories of law advanced in the submitted briefs.

In conclusion, the court adopted two firmly established principles of relevant case law:

> "(1) In all other situations in which the Federal Government holds title to the beds and banks of navigable waters, a fee patent issued by the United States to riparian lands would include the rights of access and wharfage without an express provision in the patent.
>
> (2) Where the United States holds title in trust for Indian Tribes, federal common law is applicable to a determination of the extent of a federal grant despite the lack of any express Congressional language to that effect."

Given these principles it arrived at the inescapable conclusion that when the provisions for the issuance of fee patents were written into the Act of April 23, 1904, it was the clear intent of Congress that these patents would have the same incidents of ownership that all other Federal patents to riparian lands would enjoy.

III.

Contrary to the position of the Petitioners, the Tribal fishing right is left unimpaired. The Petitioners obfuscate or ignore the "narrow" issue here involved. Intervenor has no quarrel with the principle pronounced in the case of *United States v. Winans,* 198 U.S. 371 (1905), T.P., p13.

This rule of law would permit the Tribes a right of access to exercise their reserved fishing right which would be impressed upon the riparian right to access and wharfage.

Therefore, Petitioners' assertion that the Tribes could be excluded from the lands to prevent them guaranteed Treaty fishing rights has no merit. The latter would be fully protected under the holding of *Winans, supra.*

The contention of the Petitioners that the opinion will impair the exclusive fishing rights guaranteed by the Treaty in ways other than exclusion from the lands ignores the distinction between the ownership of interests in land and the ownership of a private right such as the Indian right of exclusive fishing.

To demonstrate this distinction requires a review of the controling case law.

The title which the United States holds to lands under the navigable waters is a title held in trust for the people of the future state. The soil under navigable waters was not granted by the Constitution to the United States, but was reserved to the states, respectively. The new states have the same rights, jurisdiction, and sovereignty over the soil under navigable water as the original states, except as may be limited by express statute in the Enabling Act. See *Pollard v. Hagen,* 44 U.S. 212 (1945).

In *United States v. Holt State Bank,* 270 U.S. 49, (1925), this Court further articulated the principle as it applies to Indian Reservations:

> "It is settled law in this country that lands underlying navigable waters within a state belong to a state in its sovereign capacity and may be used and disposed of as it may elect, subject to the paramount power of Congress to control such waters for the purposes of navigation in commerce among the states and with foreign nations, and subject to the

> qualification that where the United States, after acquiring the territory and before the creation of the state, has granted rights in such lands by way of performing international obligations, or effecting the use or improvement of the lands for the purposes of commerce among the states and with foreign nations, or carrying out other public purposes appropriate to the objects for which the territory was held, such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. Barney v. Keskuh, 94 U.S. 324, 338; Shively v. Bowley, 152 U.S. 1, 47-48, 57-58; Scott v. Lattig, 227 U.S. 229, 242; Port of Seattle v. Oregon & Washington R.R. Co., 225 U.S. 56, 63; Brewer-Elliott Oil and Gas Co. v. U.S., 260 U.S. 77, 83-85. But as was pointed out in Shively v. Bowley, pp.49, 57-58, the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in exceptional instances where impelled to particular disposal by some international duty or public exigency."
>
> "It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." [9]

[9] In *Holt,* the Court reasoned because there was no attempted exclusion of others from the use of navigable waters, that the public right was not disposed of. Here there is no attempt to exclude from the waters, but, contra, in the Treaty of the Upper Missouri, an affirmative guarantee to citizens to use the navigable waters.

In the Hellgate Treaty, *supra,* the exclusive right of taking fish in "all streams running through or bordering said reservation" is further secured to the Indians. However, this right clearly is not applicable to just the Reservation area, but could be interpreted to include the North half of Flathead Lake, in that the latter "stream" borders the Reservation. [10] Therefore, it appears that the latter is a private right granted the Indians, which right has nothing to do with the ownership of the bed of the navigable lake. [11] Nothing can be inferred from this grant to support the disposal of the public's paramount rights to the navigable waters.

The distinction between ownership for navigation purposes and a license of a private right for fishing purposes is clearly shown in the Solicitor General's opinion considering the effects of the ruling in *Holt, supra,* on the fishing rights of the Chippewa Tribes on the Red Lake Reservation as follows:

> "I am mindful of the statement of the Supreme Court of the United States v. Holt Bank, supra, that while Indians of the Red Lake Reservation were to have access to the navigable waters therein and were to be entitled to use them in accustomed ways, 'these were common rights vouchsafed to all, whether Indian or white,' but when this statement is read, as it should be, in the light of the decisions cited in its support, it becomes apparent that the Court had in mind rights of navigation of a public nature and not private rights of ownership such as the Indian right of fishing." Opinion M28107, June 30, 1936,

[10] See *U.S. v. Pollman,* 364 F.Supp. 995 (1973).

[11] "The fact that navigable waters are a part of the reservation held in trust for the Indian fisheries does not conflict with the trust also to hold them for the public for navigation." *Moore v. U.S.,* 157 F.2d, 760, 765.

> as quoted in *Federal Indian Law,* 1958, Ed. at p496-498.

Article III of the Hellgate Treaty, supra, recognized the public's rights in the Reservation lands as follows:

> "And provided, that if necessary for the public convenience roads may be run through the said reservation; and, on the other hand, the right of way with free access from the same to the nearest public highway is secured to them; as also the right in common with citizens of the United States to travel upon all public highways."

While the public roads visualized by the Treaty were doubtless construed to mean land wagon roads, the word cannot be so strictly construed that it would not include ferries over navigable rivers or roads necessary for portage between navigable waters. Moreover, "public roads" running through the Reservation must be considered as an exception to the exclusive use and benefit of the Treaty.

Any ambiguities contained in the Hellgate Treaty concerning the Federal Government's reservation of its right to control the navigable waters of Flathead Lake are conclusively resolved in the subsequent Treaty of the Upper Missouri of Oct. 17, 1855, 11 Stat. 657:

> "For the purposes of establishing thoroughfares through their country... the United States may... permanently occupy as much land as may be necessary. . . . and . . . the navigation of all lakes and streams shall be forever free to citizens of the United States."

Thus, it is concluded that nothing contained in either Treaty was intended to grant away the general public's right in these navigable waters. On the contrary, these rights were expressly reserved.

IV.

The decision below does not constitute a significant precedent which, if uncorrected by this Court, will stand for the granting away of Tribal trust property and the impairment of Indian Treaty rights by implication. T.P. p6.

Contrary to the Petition of Petitioners, the opinion has nothing to do with a present granting away of Tribal trust property, or a present impairment of Indian Treaty rights. Insofar as the Flathead Reservation is concerned, the decision simply maintains the status quo. This decision merely will result in permitting the some 1600 existing riparian land owners to continue to maintain their docks and access to the navigable channels of Flathead Lake.

The Petitioners either confuse or misapprehend the relevant issue and question. As was stated by the District Court, T.P. p21a, Footnote 15, "Plaintiffs agree the United States has a power paramount to that of the Tribes over Tribal lands and waters and the United States, by clear Act of Congress, can exercise that power to the derogation of the Tribal power." Once that paramount power had been exercised by Congress in abrogating the Treaty by carving out individual land ownerships from the Tribal communal property, then the issue no longer was whether the Treaty had been abrogated, but rather, to what extent.

Congress clearly defined the extent by the Act of May 29, 1908, 35 Stat. 444. Congress provided that alloted lands "which can be sold under existing law... may be sold on the petition of the Allottee," and "that upon approval of any sale hereunder by the Secretary of Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold..."

The Federal patent is a United States grant, not a Tribal grant. Any suggestion to the prospective patentee that it carried fewer incidents of ownership, by reason of it being on a Tribal Reservation, would have frustrated the intent of the Congressional purpose of the Act.

Thus, the Treaty had been abrogated to the extent that the patent diminished the Tribal estate. The patent diminished the Tribal estate to the extent that it carried the same incidents of ownership as a Federal patent granting riparian land in Washington, D.C., New York State, or California. The latter would have had the Federal common law right of access and wharfage. A fortiori, the Federal patent to the lands here involved should enjoy the same Federal common law right.

As to other Reservations, each enjoys the benefits of one of the most fundamental principles of Federal Indian Law which, simply stated, provides that separate Treaties and agreements with separate Tribes must be separately construed. Under the guidance of *DeCoteau, supra,* the language, legislative history and surrounding circumstances of each Act will continue to be the controlling factor.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

F. L. INGRAHAM
Attorneys for Respondent-Intervenor
P.O. Box Drawer "Z"
Ronan, Montana 59864

CHRISTIAN, McCURDY,
INGRAHAM & WOLD
Professional Center Building
Polson, Montana 59860